Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

AT&T Corp.	)	
Petition for Rulemaking To Reform	)	RM Docket No. 10593
Regulation Of Incumbent Local Exchange	)	
Carrier Rates For Interstate Special	)	
Access Services	)	
	)	

REPLY COMMENTS OF CABLE & WIRELESS USA, INC.

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Pursuant to the Commission's *Public Notice*,[1] Cable & Wireless USA, Inc. ("Cable & Wireless") submits these reply comments in support of AT&T Corp.'s Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services ("Petition").[2]

INTRODUCTION & SUMMARY

The comments abundantly confirm that the BOCs are using their overwhelming special access market power to charge excessive and anticompetitive rates. Commenters ranging from IXCs, broadband providers, and CMRS carriers to end-user customers demonstrate in detail that the BOCs remain the only option for special access connections to the vast majority of buildings – particularly the majority of buildings served by DS1 and DS3 connections. As a result, and in the absence of effective rate regulation, the BOCs are behaving like classic

[1] Public Notice, *Wireline Competition Bureau Seeks Comment On AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, RM No. 10593, DA 02-2913 (released October 29, 2002).
[2] Petition of AT&T, *AT&T Corp. Petition for Rulemaking To Reform Regulation Of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, RM No. 10593 (filed October 15, 2002) ("Petition").

monopolists: they refuse to negotiate with access purchasers or to budge from their tariffed rates and have used pricing flexibility not to meet competition, but only to raise rates.

Cable & Wireless' own experience vividly confirms that the BOCs do not today face the predicted competitive pressures that were the justification for "market-based" regulation of the BOCs' special access rates. Cable & Wireless has made extensive efforts to obtain alternative special access services from CLECs, but these efforts have only confirmed that the BOCs are the only alternative for connections to the vast majority of buildings. Even more telling, Cable & Wireless' experience in negotiating with both ILECs and CLECs provides a stark contrast: Cable & Wireless has been successful in obtaining reduced rates, as well as performance guarantees and other favorable terms, from CLECs, while ILECs refuse even to negotiate and insist that Cable & Wireless take the BOCs' standard tariffed rates, which are far higher than the CLEC rates. The BOCs obviously feel no pressure to respond to competitors, even though on the relatively few routes where real facilities-based competition exists, CLECs offer better service at dramatically lower prices.

The BOCs' excessive rates are directly inhibiting the development of innovative broadband competition, and there is an urgent need for the Commission to act. The Commission's most basic mandate under the Communications Act is to ensure that dominant carriers like the BOCs charge just and reasonable rates. In 1999, the Commission predicted that its current "pricing flexibility" regime would ensure just and reasonable rates, but actual experience has shown the prediction to be wrong. Under such circumstances, the Commission has a statutory obligation to revisit its rules and to re-establish effective rate regulation. With each passing month, the BOCs obtain Phase II deregulation in more and more MSAs across the country and use that "flexibility" to increase more and more special access rates. Remedying

these unjust and unreasonable rates and the great harm they are causing in all communications markets must be one of the Commission's highest priorities this year.

I. THE BOCS RETAIN OVERWHELMING MARKET POWER IN SPECIAL ACCESS AND ARE CHARGING INCREASINGLY UNJUST AND UNREASONABLE RATES.

The comments confirm that the BOCs retain, and are exercising, market power in the provision of special access under the current rate regulation regime. As numerous commenters agree, the BOCs' extraordinary rates of return, simultaneously expanding revenues, and the growing disparity between their special access rates and costs provide compelling (indeed, undeniable) evidence of this market power.[3]

Ultimately, however, the most powerful evidence that the BOCs' rates are not, and cannot be, constrained to just and reasonable levels by market forces or competitive pressures is their own conduct. In Cable & Wireless' experience, which is based on dealings with all of the BOCs in most major markets, the BOCs simply do not behave like firms subject to real competitive pressures. Indeed, as discussed below, despite extensive efforts to find alternatives to the BOCs, Cable & Wireless has no choice but to purchase special access from the BOCs in the vast majority of cases. And as a result of that effective monopoly, the BOCs make no attempt to negotiate or otherwise reduce rates to match the much lower rates that CLECs offer in the limited instances in which they have constructed alternative facilities. The BOCs' real-world behavior speaks far louder than their comments in this proceeding, and proves beyond doubt that, contrary to earlier predictions, rate regulation remains essential.

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[3] *See, e.g.*, American Petroleum Institute Comments at 4; Arch Wireless Comments at 1; AT&T Wireless Comments at 1-2, 5; Competitive Telecommunications Association Comments at 1-2; EarthLink Comments at 1; LDMI Telecommunications, Inc. Comments at 4-6; Joints Comments of Pac-West Telecomm, Inc. and US LEC Corp. at 4-6; Sprint Comments at 3; Time Warner Telecom Comments at 3-4; WorldCom Comments at 3-4.

A. In The Vast Majority Of Cases, Cable & Wireless Has No Alternative To The BOCs.

To read the BOCs' comments, one would think that special access competition is ubiquitous and that consumers of special access services almost invariably have meaningful market alternatives to the BOCs. The BOCs point to aggregate numbers of competitive access providers, route miles of fiber, fiber-based competitor collocations, and buildings served by CLEC fiber.[4] The mere fact that CLEC fiber networks exist, however, does not speak to the real issue, which is that the BOC provides the only full facilities-based alternative to the vast majority of buildings. With rare exceptions, the BOC owns the *only* last mile link to the target buildings and, therefore, anyone who wants to serve customers in those buildings must either purchase access from the BOC or from another carrier that is merely reselling the BOC's services (and is therefore also stuck with the BOC's prices). Although CLECs have deployed some fiber transport facilities (that are far from ubiquitous), only in unusual circumstances do CLECs offer facilities-based loops (channel terminations) to end-user locations other than those with the very highest demand.

It is therefore not surprising that, without exception, every commenter that is a purchaser of special access services reports that in its actual, real-world experience, it has no meaningful market alternative to purchasing special access from the BOCs for the vast majority of its needs.[5] The universal experience of broadband providers, traditional CLECs, IXCs,

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[4] *See, e.g.*, BellSouth Comments at 14-16; SBC Comments at 4-5, 10-15; Verizon Comments at 11-21.

[5] *See, e.g.,* Ad Hoc Telecommunications Users Committee Comments at 2 ("actual end users seeking actual service providers in real markets have found few, if any, competitive alternatives to the price caps carriers' special access services"); American Petroleum Institute Comments at 3 ("viable facilities-based alternatives are few and far between"); Arch Wireless Comments at 2-3 ("CMRS carriers such as paging carriers are dependent upon the [ILECs'] ubiquitous transport networks"); *id.* at 3 ("In fact, CMRS carriers frequently have even *fewer* competitive transport

CMRS carriers, and other purchasers of special access services conclusively refutes the BOCs' contention that they operate in a competitive market, with other providers ready and striving to take their customers away. The unfortunate truth for Cable and Wireless and other access purchasers is that, in most cases, they remain at the complete mercy of the BOCs.

This is consistent with Cable & Wireless' general inability, despite diligent efforts, to obtain non-ILEC suppliers of DS1 and DS3 special access services. In 2001, Cable & Wireless undertook a major review of its local access strategy, with the objective of minimizing costs for local facilities while meeting the ever increasing needs of its customers for greater bandwidth. One of Cable & Wireless' major strategies to implement this objective (other strategies are discussed below) was to bypass the ILECs *whenever possible*, on both an individual circuit basis and an area-by-area basis.

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alternatives than CLECs and IXCs because mobile networks are deployed over larger geographic areas, including areas outside metropolitan areas where virtually no competing transport facilities have been constructed") (emphasis in original); AT&T Wireless Comments at 2 (CMRS carriers "have no choice" but to use ILEC special access services); *id.* at 3 (noting that more than 90% of its transport costs go to paying ILECs for special access services); Competitive Telecommunications Association Comments at 7 (noting "the inability of competitive telecommunications carriers to obtain any efficiently priced alternatives to ILEC special access services"); Earthlink Comments at 2 ("wholesale DSL customers like EarthLink have limited viable competitive options for wholesale broadband access"); LDMI Telecommunications, Inc. Comments at 7 ("the simple and undeniable fact is that now and for the foreseeable future, LDMI and similarly-situated ICPs have no other source for those 'last mile' connections to their customers"); Joint Comments of Pac-West Telecomm, Inc. and US LEC Corp. at 5 ("Pac-West constantly reviews all potential suppliers for special access services, but continually finds that there are generally no alternate vendors that provide effective substitutes for SBC special access services"); PaeTec Communications, Inc. Comments at 2-3 ("PaeTec has no alternatives to leasing its 'last mile' access to end users from ILECs because the ILECs face no meaningful competition. There is no place else to go"); *id.* at 5 ("There is simply no competitive wholesale market to which carriers may turn"); Sprint Comments at 3-4 (noting that Sprint Long Distance relies on ILECs for 93% of its special access needs, despite "aggressive" attempts to self-supply and switch to CLECs); XO Comments 4, 5 (noting that XO has "no realistic alternative" to purchasing ILEC special access services and would not order them from ILECs if it could self-supply or obtain them from other providers).

With respect to bypass on an individual circuit basis, Cable & Wireless developed and maintains two databases: (1) a pricing database that is regularly updated to reflect current prices from each vendor; and (2) a building access database that identifies the buildings served by individual CLECs. Based on the information from these two databases, along with information on other service offering parameters, Cable & Wireless developed Access Ordering Guidelines for each building in each market. These Access Ordering Guidelines rank in order of preference the vendors that are able to serve each building. When the need arises for service, Cable & Wireless personnel use the guidelines to order from the most cost effective and responsive vendor.

In Cable & Wireless' experience, ILECs *never* rank within the top vendors when non-ILEC suppliers are available. However, non-ILEC suppliers simply are not available in the vast majority of situations. Thus, Cable & Wireless must order from the ILEC most of the time. For example, in 2002, of the 4168 total new special access circuits installed by Cable & Wireless for end users, approximately *85%* were purchased from ILECs. The vast majority (3179 circuits) were DS1 circuits, *approximately 95 percent of which were provided by ILECs*.

Cable & Wireless also attempted to find vendors that could offer bypass of the ILECs on an area-wide basis, but quickly found that such an option was not feasible, for several reasons. First, non-ILEC vendors have limited coverage in individual markets, generally less than 10% of the coverage of the ILECs in the market. Because of this lack of coverage, none of the non-ILEC suppliers could consistently provide competitive area-wide offerings. Second, the non-ILEC vendors were forced to depend heavily on unbundled network elements ("UNEs") in order to provide a "facilities-based" competitive offer, but such vendors were not willing to offer "service level assurances" ("SLAs"), because ILECs generally do not offer them on the

underlying UNEs. Because the vast majority of customers require SLAs, Cable & Wireless could rarely use these offerings. Third, many of the largest vendors, such as WorldCom and XO, are bankrupt or experiencing severe financial distress. Cable & Wireless concluded that it could not risk tying a major element of its service to a bankrupt carrier and risk service disruption for customers. Even where alternate vendors are not bankrupt, customer concerns about *potential* bankruptcies would preclude Cable & Wireless from relying on a single vendor to bypass the ILEC (even if such a non-ILEC vendor existed). For these reasons, Cable & Wireless concluded that bypass of ILECs on an area-by-area basis was not a viable strategy.

Finally, the BOCs make much of the fact that AT&T and WorldCom have a limited ability to provide service over their own facilities due to their acquisition of fiber networks,[6] but it is important for the Commission to understand that self-supply is not an option at all for many special access purchasers, including Cable & Wireless. Indeed, each year Cable & Wireless conducts a review of the merits of either building its own access network, acquiring existing access networks, or partnering with existing special access suppliers. To date it has yet to find a viable alternative to leasing from existing vendors.

The costs associated with Cable & Wireless building and operating its own local facilities to all of the buildings it serves would be tremendous – the capital costs alone could be on the order of several billion dollars. Moreover, building in one or more cities would require several years, making an "own-build" option a long-term, not a short- or medium-term solution.

More fundamentally, whether such an investment is justified depends on whether the carrier can lower its per-unit costs to a competitive level, which in turn depends on how

many customers can be served over the relevant facilities. In that regard, the economics of building facilities depends critically on whether the carrier has a large amount of traffic aggregated in individual locations. A carrier cannot make a viable business case for investment in an access network if the carrier, as most do, has a customer base in each city that is widely distributed.[7] To make a build cost effective, the carrier typically needs three to four significant customers in a single building. Cable & Wireless is unlikely to achieve such building-by-building scale economies very often, because its retail IP services are highly specialized. This is in stark contrast to the ILECs, who were able to build out ubiquitous networks with excess capacity as protected monopolists with captive rate bases.

CLECs face other insurmountable obstacles as well. Most importantly, even today non-ILECs find that obtaining access to buildings from landlords is much more difficult and expensive than it is for the ILECs. No building owner can realistically deny access to the ILEC because of its monopoly position, but new entrants do not have such leverage and are often charged excessive amounts to gain entry to buildings (or denied entry altogether). This puts competing carriers at a substantial disadvantage when trying to gain customers.[8]

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[6] *See, e.g.*, BellSouth Comments at 15; Qwest Comments at 6, 20; SBC Comments at 13-15; Verizon Comments at 14-17.

[7] Moreover, the further customers are from the point of origination of the loops, the less favorable the economics. The recent trend of businesses relocating to the "outer suburbs" makes the business case for local networks increasingly unattractive.

[8] Cable & Wireless' conclusion that a build strategy generally is not feasible is consistent with that of other special access purchasers. *See, e.g.*, WorldCom Comments at 9 ("[B]ecause the cost of building 'adds' for WorldCom has averaged about $250,000, loop construction is economically viable only for high-traffic buildings (typically, those buildings that require multiple DS3s or SONET-level circuits). It is not economically viable for CLECs to extend their fiber networks to any of the hundreds of thousands of buildings that require only a single DS3 or a handful of DS1s"); Arch Wireless Comments at 3 ("CMRS carriers have no opportunity to reproduce [the BOCs'] facilities").

Acquisition of "undervalued" (*i.e.*, bankrupt or failing) networks is also an infeasible option. As the Commission knows, many major facilities-based CLECs have gone bankrupt in recent years, and most others have seen their share prices plummet. Cable & Wireless has considered acquiring a number of such companies, but has not done so for several reasons. First, in many cases, the longer-term business cases could not be justified due to the economic obstacles described above. Many of these companies failed for a good reason – their facilities were not well situated to support a viable business. Moreover, in considering any such acquisition, a carrier must always come back to scale economies and the potential customer base – *i.e.*, there must be a certain level of synergy between the customer base of the acquirer and the acquiree. In all cases Cable & Wireless considered, the existing and potential customer bases did not warrant the acquisition.

In short, although CLECs have built some facilities and offer facilities-based alternatives on a limited number of routes, the BOCs still offer the only alternative in the vast majority of instances. To reach end-user customers, a competing carrier has no choice but to deal with the BOC.

B. Because Of Their Overwhelming Market Power, The BOCs Make No Attempt To Respond To Competition From CLECs.

Because the ILECs face no special access competition in serving most buildings, they behave like classic monopolists. Their actual conduct in the market is undeniable proof of their market power, confirming the inference raised by their exorbitant rates of return and excessive profit margins. Cable & Wireless' recent experience in attempting to negotiate with the ILECs and CLECs speaks volumes in this regard. The contrast between dealing with ILECs for special access needs and dealing with the CLEC suppliers on the few routes where they offer true facilities-based alternatives is extreme, to say the least.

Specifically, Cable & Wireless undertook as part of its local access initiative to attempt to renegotiate its contracts with all of its special access suppliers. In July 2001, as a first step in this process, Cable & Wireless generated a request for quotation ("RFQ") that it sent to 42 vendors. The objectives of this RFQ were to (1) gather market data for vendor negotiations and for "build versus buy" evaluations; and (2) maximize opportunities for market competition by providing information to all potential vendors on Cable & Wireless' volumes and spending. Twenty-nine vendors submitted meaningful responses to the RFQ. Significantly, two of the BOCs, Verizon and Qwest, *did not formally respond at all*. Despite the lack of response from Verizon and Qwest, Cable & Wireless decided that it would be most fruitful to focus its renegotiation efforts on all 4 BOCs and 4 national CLECs. These negotiations commenced in August 2001.

Cable & Wireless' experience in negotiating with the ILECs as compared to the CLECs was like night and day. With respect to the CLECs, Cable & Wireless reached new agreements with 3 out of the 4. (The fourth CLEC offered significantly improved terms, but agreement was not reached because of delivery issues and because the proposed terms did not improve as much as with the other CLECs). In the new agreements with CLECs, the prices for new circuits decreased an average of 26%, and by as much as 42%. The terms of the agreements decreased from 3-year minimums to 1-year minimums. On a like-for-like basis of one-year terms, the effective price decreases were up to 70%. While CLEC prices were significantly below the ILECs' prices even at the *beginning* of the process, they were up to *80 percent* below the ILECs' prices after renegotiation.

Significantly, Cable & Wireless was not required to make any overall volume commitments or spending commitments for any of these new contracts. In addition, Cable &

Wireless received specific service level guarantees with respect to numerous service order intervals and installation intervals, with firm commitments and payments by the CLEC for failure to deliver, late delivery, and service outages. Finally, Cable & Wireless' termination liability under these contracts is based on the rate differential (*i.e.*, is limited to paying back the extra discounts received).

Cable & Wireless' negotiations with the BOCs were an entirely different story. After attempted negotiations with all four BOCs (Verizon, BellSouth, Qwest, and SBC), only *one* new agreement was reached.[9] None of the BOCs offered any flexibility from their standard tariffs and all of the offered reductions were conditioned upon significant commitments for an individual circuit term (3 to 5 years) and/or overall volume of business for an extended period (4 or 5 years).[10] The one new agreement involved an existing contract with a significant commitment, where Cable & Wireless agreed to an increase in the commitment in return for some limited savings. Cable & Wireless did not receive *any* service level guarantees with respect to delivery or availability in this contract. As a result, Cable & Wireless' price per ILEC circuit has decreased only an insignificant amount, mostly due to application of the annual

[9] Other commenters have had similar difficulties in negotiating with ILECs. *See, e.g.*, PaeTec Comments at 4 ("PaeTec's experience has consistently been to be treated by ILECs as if they are the only game in town. PaeTec, despite frequent requests to the ILECs, has been unable to benefit by any "flexibility" ILECs are authorized to exercise in order to meet challenges by asserted competitive special access providers"); AT&T Wireless Comments at 6 ("AWS has been unsuccessful in getting any of the BOCs to engage in serious contract negotiations in areas where the BOC has obtained pricing flexibility").

[10] Other commenters similarly complain about being forced by the ILECs to enter into OPPs in order to get any price discounts. *See, e.g.*, Sprint Comments at 5-6 ("Sprint has had the same experience with OPPs"); XO Comments at 5 ("The ILECs' best price, however, is not available without lengthy terms (as long as five years) and substantial volume (as much as 95% or more of total circuits ordered) commitments"); Arch Wireless Comments at 4 ("ILECs frequently require Arch to accede to terms such as minimum volumes or volume percentage requirements in order to avoid even more absurd pricing terms"); AT&T Wireless Comments at 6 ("[T]he only ability

productivity adjustment (or X-Factor).[11] The ILEC share of Cable & Wireless' special access expenses has been steadily increasing, largely because CLEC rates have been going down while the already much higher ILEC rates have been going up.

In addition to its efforts to renegotiate existing contracts, Cable & Wireless undertook efforts to establish contracts with next generation and regional CLECs. The results of these efforts, which began in March 2002, further demonstrate the stark contrast between dealing with CLECs and dealing with ILECs. After discussions with three competing carriers, three new contracts were successfully negotiated. These contracts provided for prices that are up to 80% below prices charged by ILECs for a one-year circuit term. Cable & Wireless did not have to make any overall volume commitment or spending commitment for any of these contracts. As with the major CLEC contracts, Cable & Wireless received specific service level guarantees with respect to numerous service order intervals and installation intervals, with firm commitments and payments by the CLEC for failure to deliver, late delivery, and service outages. Finally, as with the major CLECs, Cable & Wireless' termination liability is based on the rate differential (*i.e.*, is limited to paying back the extra discounts received). The unfortunate reality, however, is that CLECs' willingness to negotiate terms is of no help at all with respect to the vast majority of buildings where the ILECs remain monopolists.

AWS has to mitigate special access costs is by entering into long-term volume commitments with the ILECs in order to obtain pricing discounts").

[11] The actual experience of Cable & Wireless (and other commenters) in dealing with the BOCs wholly belies their self-serving assertions that they are responsive to customers and willing to negotiate in order to satisfy customer needs. *See, e.g.*, BellSouth Comments at 11-12, 13 ("pricing flexibility has enabled customers to obtain packages that balance performance and price in a manner that meets the customer's needs"); SBC Comments at 24-25; Verizon Comments at 24 (asserting that Verizon undertakes rate stability measures because it "need[s]" to be "responsive" to customers' interests), 29-30 (asserting that Verizon undertakes efforts to ensure performance "in order to be responsive to its customers in a competitive marketplace").

The ILECs' refusal to negotiate with Cable & Wireless and other carriers is a direct consequence of their monopoly position. Simply put, in the vast majority of cases they are the only game in town, and they act accordingly. Not surprisingly, the prices that Cable & Wireless pays for new circuits provided by the BOCs are uniformly much higher than the prices for new circuits provided by competing carriers. In the SBC region, for example, for DS1 circuits, Cable & Wireless pays SBC about $500, but pays major CLECs less than $250.[12] For DS3 circuits, Cable & Wireless pays SBC over $5,000; major CLECs charge as little as a quarter of that (but, of course, only to the relatively small minority of buildings where they have facilities). For OC3 circuits, Cable & Wireless pays SBC about $6,600 but rarely pays major CLECs more than half that amount. And for OC12 circuits, Cable & Wireless pays SBC about $14,500, but pays major CLECs less than $10,000. Similarly, in the Verizon region, for DS1 circuits, Cable & Wireless pays Verizon over $600, but pays major CLECs from a quarter to half that amount. For DS3 circuits, Cable & Wireless pays Verizon nearly $6,000, but pays major CLECs from $1,200 to a little over $2,000. For OC3 circuits, Cable & Wireless pays Verizon over $14,000, but pays major CLECs as little as a fifth of that amount (and always less than half of the Verizon rates). For OC12 circuits, Cable & Wireless pays Verizon more than $30,000; major CLECs charge as little as $8,500 and always less than $20,000.[13]

[12] All quoted prices are based on one-year contracts, and are for a five-mile, stand-alone circuit.

[13] The same is true in the other BOC regions. In the Qwest region, for example, Cable & Wireless pays Qwest nearly $400 for a DS1 circuit; major CLECs charge 40-70 percent less for the same circuit to the few buildings where they have deployed facilities. With respect to DS3 circuits, Cable & Wireless pays Qwest over $3,700; where competing major CLECs have facilities, they charge from $1,200 to $2,200 for the same circuit.

In the BellSouth region, for DS1 circuits, Cable & Wireless pays BellSouth about $500, but pays major CLECs from $150 to $250. For DS3 circuits, Cable & Wireless pays BellSouth just over $5,000, but pays major CLECs from $1,200 to $2,200. For OC3 circuits, Cable & Wireless pays BellSouth about $8,500, but pays major CLECs from $2,800 to $5,400. For OC12 circuits,

These disparities between ILEC and non-ILEC prices provide stark confirmation that the CLECs' presence in the market is simply too limited to place any competitive pressure on the BOCs' special access rates. The BOCs' rates are typically at least *twice* the CLEC rate, but notwithstanding that fact, the BOCs simply refuse to negotiate any other rate. The BOCs' behavior is only rational because they face no competition on most routes. These real world actions in the marketplace speak far louder than any "fact report" conjured up by the BOCs' attorneys. There can be no serious question that the BOCs retain market power and are abusing that market power in the absence of effective rate regulation.

II. CABLE & WIRELESS' EXPERIENCE CONFIRMS THAT THE BOCS' ANTICOMPETITIVE SPECIAL ACCESS PRICING DOES GREAT HARM TO THE PUBLIC INTEREST AND THE COMMISSION'S BROADBAND POLICIES.

As Cable & Wireless demonstrated in its opening comments, the competitive harm inflicted by the BOCs' monopoly pricing of special access services creates one of the most significant impediments to the deployment of broadband and other advanced infrastructures and services.[14] For this reason, reform of special access rate regulation will do much more to further the Commission's mandate to remove impediments to the deployment of advanced services than any of the initiatives proposed in other proceedings.

The BOCs' special access services are a critical – and the costliest – input into Cable & Wireless' broadband services. As the BOCs' special access rate increase (above their already excessive levels) Cable & Wireless and other suppliers either must pass these higher costs on to consumers (which necessarily reduces demand for these beneficial and wealth-

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Cable & Wireless pays BellSouth nearly $14,000, but pays major CLECs from $7,400 to just over $9,800.

[14] Cable & Wireless Comments at 17-24.

creating services) or scale back or even discontinue their own investment and operations. Either way, reduced deployment of broadband technologies is the result, to the detriment of economic growth and innovation. Indeed, the comments broadly confirm that the BOCs' existing special access rates are a severe impediment to the deployment of advanced services.[15]

Cable & Wireless' actual experience dramatically illustrates that the ILECs' excessive rates are anticompetitive and hinder the deployment of broadband technologies. Indeed, in many instances, they *preclude* Cable & Wireless from offering broadband services to end users. For example, CLEC rates for OC circuits (which are the circuits for the highest bandwidths) are dramatically lower than ILEC rates in a number of markets. The cost differential is so great in some markets that Cable & Wireless is literally precluded from offering its IP-based services to end users on a cost-effective basis unless it can use a CLEC. In 2002, for example, Cable & Wireless installed only 237 OC circuits for its end users, and approximately 96% of these were provided by CLECs. That is because Cable & Wireless offers these services only to building that are served by CLECs so that Cable & Wireless can avoid the ILECs' high rates. In this respect (and many others), the BOCs' special access rates are severely anticompetitive and prevent carriers like Cable & Wireless from offering innovative broadband services.

III. THE COMMISSION HAS A CLEAR LEGAL OBLIGATION TO REFORM SPECIAL ACCESS RATE REGULATION.

As Cable & Wireless demonstrated (at 24-25), the Commission has a clear legal obligation to revisit its regulation of special access rates pursuant to its affirmative "duty to

[15] *See, e.g.,* Ad Hoc Telecommunications Users Committee Comments at 2, 4-5; Competitive Telecommunications Association Comments at 7-8; EarthLink Comments at 3-4.

execute and enforce the provisions of the [Communications] Act,"[16] which expressly requires that "*[a]ll* charges . . . and regulations for and in connection with . . . communications service . . . shall be just and reasonable."[17] The Commission made a predictive judgment in adopting the pricing flexibility regime that BOC market power would be constrained under that regime, and it is now clear in light of actual experience that the Commission's predictive judgment was wrong. Accordingly, under fundamental principles of reasoned decisionmaking, the Commission cannot simply stand by and let its failed regulatory scheme continue to operate, to the clear detriment of competition and consumers.

The commenters agree – and no BOC commenter disputes – that the Commission's obligation to engage in reasoned decisionmaking includes a duty to revisit regulations based on predictive judgments when actual experience proves those judgments to be flawed.[18] Indeed, the Commission's obligation in this regard is well established.[19] The commenters also agree that there is now compelling evidence that the Commission's predictive forecast has turned out to be inaccurate and that the BOCs retain and are exercising significant

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[16] 47 U.S.C. § 151; *see also MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985); *American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978).

[17] 47 U.S.C. § 201(b) (emphasis added).

[18] *See, e.g.,* LDMI Telecommunications, Inc. Comments at 10; Time Warner Telecom Comments at 4 & n.3.

[19] *See*, *e.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully"); *Aeronautical Radio, Inc.* v. *FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (approving Commission's spectrum allocation scheme, "with the *caveat*, however, that, should the Commission's predictions about the effectiveness of international coordination prove erroneous, the Commission will need to reconsider its allocation in accordance with its continuing obligation to practice reasoned decisionmaking"); *National Association of Regulatory Utility Commissioners*, 525 F.2d 630, 638 (D.C. Cir. 1976) ("The Commission retains a duty of continual supervision" of its frequency spectrum allocation system and must be "on the lookout for possible anticompetitive effects"); *see also American Airlines,*

market power under the pricing flexibility regime.[20] Accordingly, it would be reversible error for the Commission simply to do nothing and adhere to its demonstrably flawed policy.[21]

As Cable & Wireless further demonstrated (at 25), the Commission is obligated to prevent the BOCs' market power abuses for the additional reason that they are thwarting the deployment of and competition for broadband services, in contravention of Sections 230(b)(2) and 706(a), by charging supracompetitive prices for a critical input to broadband services. Again, no commenter disputes the Commission's obligation to act to eliminate unlawful impediments to broadband competition. The BOCs' exorbitant special access rates plainly are an impediment to broadband competition, and the Commission therefor has an obligation to reform special access rate regulation to remove barriers to deployment of broadband and other advanced services. Moreover, as Cable & Wireless demonstrated, inaction by the Commission would raise serious questions as to whether the United States is in violation of its commitments under the WTO and the Basic Telecom Agreement, pursuant to which the United States pledged

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Inc. v. *CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) ("[I]t is the obligation of an agency to make re-examinations and adjustments in the light of experience").

[20] LDMI Telecommunications, Inc. Comments at 4; Joint Comments of Pac-West Telecomm, Inc. and US LEC Corp. at 5-6; PaeTec Communications, Inc. Comments at 3-4; Sprint Comments at 5; Time Warner Telecom Comments at 4, 12; WorldCom Comments at 7.

[21] *Geller* v. *FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (vacating Commission's denial of petition for new rulemaking concerning its cable television rules on ground that the justification for the rules "has long since evaporated" and "the Commission is statutorily bound" to determine whether "the vital link between Commission regulations and the public interest" still exists); *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) ("[A]n agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed") (describing *Geller*); *see also Maier* v. *EPA*, 114 F.3d 1032, 1040 (10th Cir. 1997) ("[W]e will not blindly uphold agency refusals to initiate rulemaking in the face of new information").

to adopt procompetitive regulations that would prevent incumbent providers from anticompetitively maintaining their dominant position.[22]

In short, the Commission has a clear obligation to act, and to act quickly. Radical pricing flexibility has backfired, and the BOCs have responded by raising their special access rates rather than using flexibility to respond to competition. The undisputed fact that the BOCs have not responded to competition by reducing their rates is the telling proof that the CLECs' presence in the special access market is simply too limited to generate any competitive pressure on the BOCs' monopoly rates. But that predicted existence of real competitive pressures was the entire basis of pricing flexibility, and the subsequent confirmation that such competitive pressures do not exist compels rate regulation reforms to return the BOCs' special access rates to just and reasonable levels.

[22] Cable & Wireless Comments at 25-26 (citing *Foreign Participation NPRM* ¶¶ 30-40; *see also Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, ¶¶ 25-29 (1997) ("*Foreign Participation Order*").

CONCLUSION

For the foregoing reasons, and for those stated in Cable & Wireless' opening comments, the Commission should immediately reform its regulation of special access rates to reduce rates to just and reasonable levels and to prevent future monopoly abuses.

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January 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2003, I caused true and correct copies of the forgoing Reply Comments of Cable & Wireless to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: January 23, 2003
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